

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

WILDEARTH GUARDIANS,

Plaintiff,

v.

U.S. FISH AND WILDLIFE SERVICE

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff WildEarth Guardians (“Guardians”) brings this action against Defendant U.S. Fish and Wildlife Service (“FWS”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”).

2. On February 23, 2011, pursuant to the FOIA, Guardians requested from FWS certain records, including reports submitted by each State to FWS under the Airborne Hunting Act. FWS violated the FOIA by failing to respond to Guardians’ FOIA request in the manner and timeframe required by the FOIA, and by withholding the requested records. Guardians now seeks a court order declaring that FWS has violated the FOIA and ordering FWS to promptly produce the requested records.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. §§ 2201, *et. seq.* (declaratory judgment). The relief requested is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 2201 *et. seq.*.

4. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B), as this FOIA request was submitted by Guardians' Denver, Colorado office.

PARTIES

5. Plaintiff WILDEARTH GUARDIANS is a non-profit conservation organization with approximately 4,500 members throughout the United States. Guardians is dedicated to protecting and restoring wildlife, wild rivers, and wild places in the United States, and to research, public education, and advocacy on environmental issues of public importance, including government management of public lands and conservation of wildlife. One of Guardians' goals is to raise public awareness about aerial gunning of wildlife. In part, Guardians works in furtherance of its goals by acquiring information regarding state and federal programs and activities through the federal Freedom of Information Act. Guardians then compiles and analyzes that information and, subsequently, disseminates that information to its membership, the general public, and public officials through publications, reports, its website and newsletter, general news media coverage, and public presentations. Guardians and its members are directly injured by FWS's failure to comply with the statutory requirements of FOIA and a favorable outcome of this litigation will redress that injury. WildEarth Guardians brings this action on behalf of itself, its staff, and its members.

6. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency of the United

States government and is headquartered at 1849 C Street, N.W., Washington, DC 20240. As a federal agency, the FWS is obligated to comply with the mandatory requirements of the FOIA. FWS has possession, custody, and control of the records to which Guardians seeks access.

LEGAL BACKGROUND

7. FOIA requires federal agencies to determine within 20 working days after the receipt of any FOIA request whether to comply with that request and to immediately notify the person making such request of that determination and the agency's reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i).

8. FOIA requires federal agencies to make a final determination on all FOIA requests that it receives within 20 working days after the receipt of such request, unless the agency provides notice to the requester of "unusual circumstances" meriting additional time for responding to a FOIA request. 5 U.S.C. § 552(a)(6)(A)(i).

9. FOIA requires that all federal agencies must promptly provide copies of all non-exempt agency records to those persons who make a request for records that reasonably describes the nature of the records sought, and which conforms with agency regulations and procedures in requesting such records. 5 U.S.C. § 552(a)(3)(A).

10. A Plaintiff is deemed to have exhausted its administrative remedies when the federal agency fails to comply with the applicable time limit provisions of the FOIA. 5 U.S.C. § 552(a)(6)(C)(I).

FACTUAL BACKGROUND

11. On February 23, 2011, Guardians submitted a FOIA request to FWS Region 1, for certain annual reports submitted by the States of Hawaii, Idaho, Oregon, and Washington to FWS pursuant to the Airborne Hunting Act (hereinafter the "AHA FOIA request"). Specifically,

Guardians requested the following records:

- (1) A list of the States and agencies thereof that issued aerial-gunning permits pursuant to the Airborne Hunting Act, 16 USD §742j-1, from year 2005 to 2010, for each year.
 - (2) All annual reports in their entirety from 2005 to 2010, filed with the Secretary of Interior pursuant to the Airborne Hunting Act, 16 USD §742j-1, by the States of Hawaii, Idaho, Oregon, and Washington, and any agency thereof, including but not limited to the following information: (A) the name and address of each person to whom a permit was issued; (B) a description of the animals authorized to be taken thereunder, the number of animals authorized to be taken, and a description of the area from which the animals are authorized to be taken; (C) the number and type of animals taken by such person to whom a permit was issued; and (D) the reason for issuing the permit.
 - (3) All attachments and correspondence to the aforementioned annual reports.
12. On or about February 23, 2011, Guardians submitted its AHA FOIA request to FWS Region 2 for the States of Arizona, New Mexico, Oklahoma, and Texas.
 13. On or about February 23, 2011, Guardians submitted its AHA FOIA request to FWS Region 3 for the States of Iowa, Illinois, Indiana, Minnesota, Missouri, Michigan, Ohio, and Wisconsin.
 14. On or about February 23, 2011, Guardians submitted its AHA FOIA request to FWS Region 4 for the States of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee, and for the U.S. Virgin Islands and Puerto Rico.
 15. On or about February 23, 2011, Guardians submitted its AHA FOIA request to FWS Region 5 for the States of Connecticut, District of Columbia, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Virginia, Vermont, and West Virginia.
 16. On or about February 23, 2011, Guardians submitted its AHA FOIA request to FWS Region 6 for the States of Colorado, Kansas, Montana, North Dakota, Nebraska, South

Dakota, Utah, and Wyoming.

17. On or about February 23, 2011, Guardians submitted its AHA FOIA request to FWS Region 7 for the State of Alaska.

18. On or about February 23, 2011, Guardians submitted its AHA FOIA request to FWS Region 8 for the States of California and Nevada.

19. Guardians' AHA FOIA requests were received by every FWS regional office on or before February 28, 2011.

20. The statutory 20-day deadline for each regional FWS to provide Guardians with a substantive response to its AHA FOIA requests was on or before March 28, 2011.

21. On or about March 11, 2011, the FWS FOIA Coordinator for Regions 1 and 8 informed Guardians by letter that its AHA FOIA requests to Regions 1 and 8 were referred to Johnny Hunt, the national FWS FOIA Officer, for a direct response.

22. In the March 11, 2011 letter, the FWS FOIA Coordinator for Regions 1 and 8 informed Guardians that it would be contacted by the national FWS office if there were fee or scope issues, or if the request was overly broad, unclear, or involved an extremely voluminous amount of records or a burdensome search, so that Guardians could identify and clarify the records it was seeking. Guardians received no such request from the national FWS office regarding its AHA FOIA requests.

23. By letter on or about March 11, 2011, E. Ray McLaughlin, the Alternate FWS FOIA Officer at FWS headquarters, acknowledged receipt of Guardians' AHA FOIA requests referenced in Paragraphs 11-18 of this Complaint, submitted to all FWS regions. In that letter, Mr. McLaughlin informed Guardians' attorney, Ashley Wilmes, that the headquarters FWS office would respond directly to Guardians' AHA FOIA requests to all regions. FWS provided a

single tracking number for all Guardians' AHA FOIA requests, FWS 2011-00547. The letter did not purport to respond to Guardians' AHA FOIA requests with a determination as required by the FOIA.

24. FWS headquarters did not request any further information from Guardians that would toll the 20-day period for a substantive response to the FOIA requests.

25. FWS headquarters did not represent that there were any unusual or exceptional circumstances that would justify a failure to comply with the 20-day response deadline under the FOIA.

26. By phone call and by email to Guardians' attorney Ashley Wilmes on or about April 26, 2011, Johnny Hunt confirmed that FWS did not yet have a substantive response to Guardians' FOIA request. He informed Ashley Wilmes that Bennie Williams of FWS would be responding to Guardians' request.

27. In an email to Guardians' attorney Ashley Wilmes on April 27, 2011, Bennie Williams confirmed that FWS did not yet have a response to Guardians' FOIA request.

28. On May 10, 2011 and June 7, 2010, Guardians sent letters via email to Johnny Hunt, E. Ray McLaughlin, and Bennie Williams requesting a final determination of whether FWS would be fully complying with Guardians' FOIA request by releasing all the information requested.

29. On June 9, 2011, Mr. McLaughlin confirmed in an email to Guardians' attorney Ashley Wilmes that FWS did not yet have a response to Guardians' FOIA request.

30. As of the date of filing this Complaint, FWS has not yet responded to Guardians with a substantive determination as to whether it will comply Guardians' AHA FOIA requests.

31. As of the date of filing this Complaint, Guardians has not received any of the

documents it requested from FWS.

CLAIMS FOR RELIEF

COUNT 1

(Failure to Issue Substantive Determination within 20 Working Days)

32. Guardians incorporates the allegations in all preceding paragraphs of this Complaint as if set forth in full herein.

33. FWS failed to determine within 20 working days after the receipt of Guardians' AHA FOIA requests as to whether the agency would comply with the requests and failed to immediately notify Guardians of that determination, in violation of the FOIA, 5 U.S.C. § 552(a)(6)(A)(i).

34. FWS continues to violate the FOIA by failing to provide a substantive response to Guardians' AHA FOIA requests.

COUNT 2

(Failure to Make Records Promptly Available)

35. Guardians incorporates the allegations in all preceding paragraphs of this Complaint as if set forth in full herein.

36. FWS failed to promptly provide the records requested by Guardians in its AHA FOIA requests, in violation of the FOIA, 5 U.S.C. § 552(a)(3)(A).

37. FWS continues to violate FOIA by withholding the records Guardians requested in its AHA FOIA requests.

PRAYER FOR RELIEF

WHEREFORE, based upon the allegations contained in the foregoing paragraphs, WildEarth Guardians requests that this Court:

1. Declare that FWS violated the FOIA by failing to notify Guardians within the

deadline established by the FOIA as to whether the agency will fully comply with Guardians' FOIA requests;

2. Declare that FWS violated the FOIA by failing to promptly provide the requested records;

3. Issue an order enjoining FWS from withholding the requested agency records and requiring FWS to promptly produce the requested records in full;

4. Issue an order requiring FWS to pay the costs of this action, including the filing fee and reasonable attorney fees;

5. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ Ashley D. Wilmes

Ashley D. Wilmes
WildEarth Guardians
827 Maxwell Avenue, Suite L
Boulder, Colorado 80304
Tel. 859-312-4162
awilmes@wildearthguardians.org

/s/ James J. Tutchton

James J. Tutchton
WildEarth Guardians
6439 E. Maplewood Ave.
Centennial, CO 80111
Tel. 720-301-3843
jtutchton@wildearthguardians.org

Attorneys for Plaintiff WildEarth Guardians

Dated: July 1, 2011

Plaintiff:
WildEarth Guardians
1536 Wynkoop Street, Suite 301
Denver, Colorado 80202